87-1992

Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

October Term, 1987

PETER KERO,

*Petitioner,*

*vs.*

CHARLES MOREL, JR., Individually and CHARLES J. MOREL, JR. BUILDERS, INC., a New Jersey Corporation,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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## QUESTION PRESENTED FOR REVIEW

Does a court of law, in fashioning a remedy of specific performance of a contract for the sale of real estate, which contract is conditioned upon the seller's obtaining municipal subdivision approval and performing subdivision improvements, violate the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States, by appointing the buyer as the seller's agent in applying for the subdivision approval and performing the improvements on behalf of and at the expense of the seller?

## LIST OF PARTIES

The parties to this action in the lower court were as follows:

Charles J. Morel, Jr. Individually, and Charles J. Morel Jr. Builders, Inc., a New Jersey Corporation - plaintiffs-respondents; Peter W. Kero - defendant-appellant; and Ann Kero, his wife - defendant.

Ann Kero was dismissed as a defendant pursuant to the granting of a motion of petitioner's counsel by the trial court (42a).

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No.

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October Term, 1987

PETER KERO,

*Petitioner,*

*vs.*

CHARLES MOREL, JR., Individually and CHARLES J. MOREL, JR. BUILDERS, INC., a New Jersey Corporation,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Petitioner Peter Kero respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division.

## OPINIONS BELOW

The opinion and judgment of the Superior Court of New Jersey, Law Division, Morris County is unreported. The opinion

of the Superior Court of New Jersey, Appellate Division is unreported. The denial of petitioner's petition for certification to the New Jersey Supreme Court is not yet reported.

## STATEMENT OF JURISDICTION

Review is sought of the judgment of the Superior Court of New Jersey, Appellate Division, which was rendered on November 13, 1987. The petition for certification to the New Jersey Supreme Court was denied on February 29, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The following constitutional provisions are involved in this case:

1. United States Constitution, Amendment Five:

> Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property.
>
> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. United States Constitution, Amendment Fourteen:

> 1. Citizenship rights not to be abridged by states
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

1. On or about February 4, 1985 petitioner Peter Kero, the seller, and respondent Charles J. Morel, Jr. Builders, Inc., the buyer, entered into a conditional contract for the sale of some 50 acres of land in Montville Township, New Jersey. The condition was that petitioner (seller) obtain approval of a certain major subdivision application from the Montville Township Planning Board.

Under the terms of the contract, petitioner had the obligation to proceed with the subdivision application at his expense as well as providing all municipal improvements, including roads and utilities, required by the Township, likewise at his expense.

On or about April 24, 1986, respondent filed a complaint in the Superior Court of New Jersey, Chancery Division, Morris County alleging that petitioner had breached the contract. The petitioner denied that he breached the contract. It was the petitioner's contention that the contract was lawfully terminated because it was conditioned upon the approval of a certain major subdivision application that petitioner had designed and filed and that said condition failed.

On or about February 18, 1987 judgment was rendered for the respondent in the Chancery Division granting respondent specific performance of the contract.

The judgment authorized respondent to proceed with a new application for approval of a major subdivision in the place and stead, and at the expense of petitioner. The judgment also authorized respondent to construct all subdivision improvements required by Montville Township at petitioner's expense.

This remedy, designed by the trial court, presented a clear conflict of interests. Respondent, who intended to build 48 homes on the land in question after the major subdivision was approved and the improvements installed, had no incentive to design the subdivision and make the improvements (roads, sewers, drainage, etc.) in the most economical way because all that was being done at petitioner's expense. Respondent was interested in speed not cost. The faster the subdivision work was completed, the sooner respondent could build and sell its homes and realize its profits. By virtue of the trial court's order the respondent could design the subdivision in a way that would make its site development economically prohibitive and use the most expensive labor and materials available in constructing the improvements and petitioner would have no recourse.

On the other hand, the subdivision plan and the cost of the municipal improvements described in it, were of vital concern to petitioner because he was the one who was paying all expenses. The contract gave him virtually complete control over their design and construction (subject to approval by the municipality). To petitioner, such control meant the difference between a profitable venture and one that could yield catastrophic losses. Yet, pursuant to the trial court's judgment, petitioner was stripped of any control over the nature of the subdivision submitted to the municipality and the nature, manner and cost of the municipal improvements installed thereon.

On November 13, 1987 the Superior Court of New Jersey, Appellate Division, affirmed the trial court's decision in a per

curiam opinion. The Appellate Division held that the trial court was justified in essentially appointing respondent as petitioner's agent in obtaining subdivision approval and constructing the subdivision improvements because "the unconscionable conduct of defendant was designed to avoid his contract obligation." [The Appellate Division reached this conclusion despite the fact that the trial court stated specifically in the judgment awarding respondent specific performance that the court found no willful breach of contract by petitioner (42a).]

On February 29, 1988, a petition for certification to the New Jersey Supreme Court in the matter was denied.

II. Petitioner raised the issue of a violation of due process in the trial court. The trial judge stated that he could order respondent (plaintiff) to pursue the subdivision application and charge petitioner for it (19a). Petitioner's counsel responded immediately, "Well it seems to me that would be unreasonable." (19a).

While counsel did not specifically cite the Fifth or Fourteenth Amendments, the argument that the remedy proposed by the court was unreasonable, amounted to a due process argument.

> It would be unreasonable because the plaintiff would have different incentives than Mr. Kero and there would he a tremendous conflict of interest because he would be concerned in getting this subdivision approval as quickly as possible so he can start making money on his — he wouldn't be concerned with cutting costs, getting it done in the most inexpensive way."

(19a).

As the trial judge later stated:

> I accept the argument of defense counsel that I shouldn't be making Kero do something he doesn't want to do by force processing these applications.

(36a-37a).

In fact, the court did something far more injurious to petitioner. It gave respondent what amounted to a blank check on petitioner's bank account by ordering that petitioner pay for the subdivision and improvements designed and constructed by respondent.

Petitioner again addressed this issue in his appellate brief (46a-49a). Petitioner wrote:

> In the case at bar, the Contract requires the defendant to seek approval for the major subdivision application which was pending at the time the contract was signed. That subdivision application was withdrawn. Which subdivision application is the plaintiff to file? What are its terms and conditions? Suppose the Planning Board requires changes. Does the plaintiff have a right to consent without defendant's consent? Does the defendant have a right to appeal if the Planning Board's requirements are unreasonable? Hasn't the Court below taken that right away from him? These questions point out the impropriety of the Court's judgment. By giving the plaintiff the right to pursue the subdivision application, the Court rewrote the contract and gave the plaintiff *carte blanche* to pursue any subdivision application it chooses [46a].

* * *

> However, the Court's Order of Judgment was far more injurious to defendant than merely giving the plaintiff an inappropriate and unenforceable remedy, because the Court gave the *plaintiff* the right to make the application for subdivision approval and the Court gave the *plaintiff* the right to do the improvements required by the Planning Board, all at defendant's expense. These were rights and obligations given to the *defendant* by the Contract [47a].
>
> * * *
>
> The Court cannot, in the name of "framing a remedy" completely run "rough shod" over defendant's rights. That is exactly what the Court below did. . . [49a].
>
> * * *
>
> This is a devastating financial disaster imposed upon defendant by the Court below. It is tantamount to a confiscation of defendant's property [49a].

The Appellate Division, in its per curiam opinion, did not address the issue. It simply reiterated the trial court's finding that the relief of specific performance, although resting on plaintiff's gaining subdivision approval, constituted an appropriate remedy (3a).

Petitioner raised the issue again in his petition for certification to the New Jersey Surpeme Court. He pointed out that the trial court's order of specific performance, giving the respondent the right to make the application for subdivision approval and make any necessary improvements, all at petitioner's expense, had essentially made respondent petitioner's agent even though their interests were contrary and they could not possibly maintain a

valid fiduciary relationship (50a).

The New Jersey Supreme Court denied the petition for certification.

Although, petitioner did not specifically cite the Fifth and Fourteenth Amendments below it was clear that petitioner was making a "due process" argument. Thus, this petition is simply an enlargment of the question raised in the assignment of errors in the state courts.

## REASONS FOR GRANTING THE WRIT

### THE STATE TRIAL COURT'S REMEDY OF SPECIFIC PERFORMANCE DEPRIVED PETITIONER OF DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT.

The protection of the individual against arbitrary action by the government is the very essence of due process. *Slochower v. Board of Education*, 350 U.S. 551, 559, *reh. denied*, 351 U.S. 944 (1956).

The Fifth Amendment provides, in pertinent part, that "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." This prohibition applies to the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

In order for the due process clause of the Fourteenth Amendment to pertain, there must be a determination as to whether there has been an unlawful deprivation of a constitutionally protected interest. This determination is made through a two-part process. First, it must be established that there

is a constitutionally protected interest, and, second, the individual must have been deprived of that interest without due process of law. *Turnquist v. Elliott,* 706 F.2d 809, 810-11 (7th Cir. 1983).

The Fourteenth Amendment protects property and liberty interests. *Board of Regents v. Roth,* 408 U.S. 564 (1971).

> "Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . [t]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."

*Board of Regents v. Roth, supra* at 571 *citing National Ins. Co. v. Tidewater Co.,* 337 U.S. 582, 576 (Frankfurter, J. dissenting).

In the present case, there can be no question that there has been both a constitutionally protected interest and an unlawful deprivation of that interest without due process.

The contract for sale dated February 5, 1985 — which is at the heart of this litigation — specifically gave the petitioner the right to proceed with the subdivision application as well as any other application necessary to obtain final subdivision approval. This of necessity involved the ability to design the subdivision and the municipal improvements contemplated therein. Under his contract, petitioner was also to construct the improvements approved by the municipality (55a).

The trial court, after finding that petitioner was in breach of contract, gave the right to design the subdivision, make the application for subdivision approval and construct the municipal improvements to the respondent all at the expense of the petitioner.

As the petitioner argued in his brief to the Appellate Division of the Superior Court of New Jersey, this was tantamount to a confiscation of property.

The situation as it currently stands is that the respondent can spend the petitioner's money without the petitioner having any say in the matter. This amounts to a taking of petitioner's property. This taking is a deprivation of petitioner's property within the purview of the Fifth Amendment. It is obvious that any action taken by a state court is state action. Therefore, it is respectfully submitted that the trial court cannot, in fashioning a remedy, do so in a way that expropriates petitioner's property.

The respondent has no incentive to seek the most economical means of obtaining subdivision approval and making the municipal improvements. The respondent's primary motivation is to obtain the subdivision approval and make the improvements as quickly as possible. Cost is not a concern of respondent's as petitioner is bearing it.

In *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Hawaii, 1978), the defendant instituted an eminent domain action to acquire seashore land in order to turn it into a public beach. The plaintiffs' predecessors in title had registered this land in the Land Court of the State of Hawaii and obtained a Decree of Registration and Owner's Certificate of Title. The shorefront land was bounded on the seaward side by a meandering line along the high water mark which was fixed, in accordance with established practice, along the seaweed line. When the land was registered the boundaries of the land were fixed by decree of the Land Court.

In the trial for damages for compensation the defendant argued that erosion had diminished the size of plaintiffs' land thereby reducing the compensation due them.

In determining the extent of the erosion, the trial court changed the means of measuring the seaward boundary, using the upper reaches of the wash of the waves as evidenced by the line of debris on the shore instead of the seaweed line.

The plaintiffs appealed the trial court's assessment of compensation to the Hawaii Supreme Court, contending that the seaward boundary had been conclusively fixed by the Land Court judgment.

The Hawaii Supreme Court, as the District Court found, not only approved the trial court's redefinition of the seaward limit of the land but extended it. It established that the seaward boundary should be at the vegetation line. The plaintiffs were not entitled to compensation for any land seaward of that line.

In their argument to the District Court, the plaintiffs claimed that the Hawaii Supreme Court's relocation of their seaward boundary unlawfully deprived them of land by changing the monument by which the high water mark was determined. (The debris line used by the trial court was 27 feet inland of the previously used seaweed line while the vegetation line, used by the Hawaii Supreme Court, was 43 feet inland from it.) They had previously contended, in a petition for rehearing to the Hawaii Supreme Court, that the redefinition of the high water mark effected a taking of their property without just compensation in violation of the Fifth and Fourteenth Amendments.

The District Court held that the Hawaii Supreme Court's *sua sponte* declaration that all of the property seaward of the vegetation line belonged to the public without any meaningful hearing on the subject deprived plaintiffs of procedural due process and granted plaintiffs an injunction.

But the District Court further held that plaintiffs had also

been deprived of *substantive due process*. The court found that there was no legal, historical, factual, precedential or other basis for the Hawaii Supreme Court's redefinition of the seaward boundary and that the action of the Hawaii Supreme Court constituted a taking of the plaintiffs' property without just compensation in violation of the Fourteenth Amendment.

Just so, the trial court's actions in this case, by redefining and redistributing the rights and obligations originally called for by the contract between the parties, constitutes a taking of petitioner's property — the money expended in constructing the subdivision and the municipal improvements — without just compensation.

The point that courts, as well as legislatures, act unlawfully when they deprive persons of property without due process is further made by Justice Stewart in his concurring opinion in *Hughes v. Washington*, 389 U.S. 290 (1967). That case involved the question of whether federal or state law controlled the ownership of accretions to oceanfront property. Justice Stewart wrote:

> There can be little doubt about the impact of that change upon Mrs. Hughes: the beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case

> made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property — without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, *no less through its courts than its legislature,* and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

*Hughes, supra* at 297-98 (last emphasis added).

In *Brinkerhoff-Faris Trust & Savings Company v. Hill,* 281 U.S. 673 (1930), this Court found that the Missouri Supreme Court had deprived plaintiff of due process of law. While in *Brinkerhoff-Faris* that deprivation was procedural, this Court found that a court no less than a legislature could deprive a person of due process.

> [W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. *Whether acting through its judiciary* or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

*Brinkerhoff-Faris, supra* at 682 (emphasis added).

It is necessarily deducible that if a court may deprive a person of procedural due process it can as well deprive that person of substantive due process given the proper circumstances.

The unique aspect of this case is that the due process deprivation occurred not during the course of the trial but after the verdict, in the fashioning of the remedy. This distinguishes it from *Sotomura* where the first deprivation occurred during the course of the trial on damages when the trial court redetermined the location of the seaward boundary and then again when the Hawaii Supreme Court did the same. If courts are able to "take" property unconstitutionally, then no party would ever have any recourse against any unfair and unreasonable deprivation of property by a court in fashioning a remedy, no matter how egregious.

The District Court in *Sotomura* perceived the motivation for the Hawaii Supreme Court's decision:

> The decision in *Sotomura* was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shore line. A desire to promote public policy, however, does not constitute justification for a State taking private property without compensation. The Fourteenth Amendment to the Constitution forbids it.

*Sotomura, supra* at 481.

Similarly, the Appellate Division of the New Jersey Superior Court in affirming the trial court's decision in the instant case justified the trial court's fashioning of an unconstitutional remedy on the basis that:

> [The trial judge] also recognized the unconscionable conduct of the defendant was designed to avoid his contract obligation. Under

> such circumstances, we conclude that the relief of eventual specific performance, although resting on plaintiff's gaining subdivision approval, constituted an appropriate remedy.

(5a).

The Superior Court of New Jersey, Appellate Division can no more take petitioner's property to punish him for alleged unconscionable acts than the Hawaii Supreme Court could take Sotomura's property to promote public policy. [And here the Court's reference to unconscionable conduct by petitioner was in direct conflict with the trial court's *specific finding* that petitioner did not willfully breach the contract (42a).]

In *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982), the plaintiff, an attorney, was appointed to represent an indigent defendant by a Missouri state court despite the fact that the state legislature had not appropriated sufficient funds to either pay him or cover his expenses. Under those conditions, plaintiff refused to accept the appointment. He was found in contempt and sentenced to prison for 10 days.

After being denied relief via a writ of habeas corpus in both the Missouri Supreme Court and the federal district court, plaintiff filed an appeal to the Eighth Circuit.

The Court of Appeals held that compelling an attorney to represent a defendant without payment was not unconstitutional because it was an obligation that the attorney had consented to and assumed as an officer of the court upon his admission to the bar.

However, compelling him to pay expenses was a different matter. The court found that attorneys were no more obliged to

pay such expenses than any other class of citizens. Specifically, it held that:

> Counsel was thus ordered to advance payment of funds necessary to the defense of the accused. We find that execution of this order would constitute a "taking" of counsel's property without just compensation in violation of the due process clause of the fourteenth amendment.

*Williamson, supra* at 1216.

In *Roberts v. New York City*, 295 U.S. 264 (1934), Justice Cardozo speaking for this Court on whether a judgment for damages in a condemnation suit could rise to the level of a violation of due process stated:

> To bring about a taking without due process by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action.

*Roberts, supra* at 277.

It is respectfully submitted that that is exactly what happened in this case. The trial court's appointment of the respondent as petitioner's agent was an arbitrary action that constituted gross error on its part, an error that has yet to be corrected and amounted to a violation of due process.

The due process clause of the Fifth and Fourteenth Amendments requires that the means used by the state in exercising its power bear a relationship to the end sought to be accomplished. *Nebbia v. New York*, 291 U.S. 502, 525 (1933). As the *Nebbia* Court stated:

> And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained.

*Nebbia, supra* at 25.

A rational basis test akin to that used in equal protection analysis is the standard by which to measure whether actions are in compliance with the due process clause of the Fifth Amendment. *Richardson v. Belcher,* 404 U.S. 78, 81 (1971).

In that case, this Court found that the offset provision of Section 224 of the Social Security Act reducing the amount of the appellee's social security disability benefits upon a finding that he was also receiving workmen's compensation benefits did not deprive him of due process under the Fifth Amendment. The appellee argued that the classification embodied in Section 224 was arbitrary because it discriminated between those employees who receive workmen's compensation and those who receive compensation from private insurance or from tort claim awards. The *Richardson* Court disagreed. It stated:

> A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is "rationally based and free from invidious discrimination." *Dandridge v. Williams,* 397 U.S. 471, 487. While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification that meets the test articulated in *Dandridge* is perforce consistent with

> the due process requirement of the Fifth Amendment.

*Richardson, supra* at 81.

Applying that standard to the present case, it becomes patently evident that there is no rational basis for the court's fashioning of its remedy. The trial court obviously felt that it could not supervise the petitioner's actions if it were to order him to pursue the subdivision approval and install the municipal improvements in accordance with the terms of the contract, thereby making specific performance inappropriate as a remedy. In attempting to meet the practical difficulties posed by such a situation, however, the court went beyond the bounds of its lawful authority by giving respondent what amounted to a blank check to design the subdivision and do the improvements on behalf of and at the expense of the petitioner. The consequence of that is that the respondent can "run up the bill" as much as it wants and the petitioner can do nothing about it. The expropriation of petitoner's property is not a remedy rationally related to the trial court's finding that he breached the contract. Damages would have been a remedy rationally related to the verdict, not specific performance that results in a taking of petitioner's property. Just as the *Nebbia* Court stated that "the reasonableness of each regulation depends upon the relevant facts", *Nebbia, supra* at 25, so the reasonableness of the trial court's actions in fashioning a remedy in the instant case depends on the facts of the case. As has been shown, expropriating petitioner's property as a remedy for the claimed breach of contract is abundantly unreasonable.

For the above reasons, petitioner respectfully urges this Court to reverse the state court's decision.

## CONCLUSION

Petitioner Peter W. Kero respectfully submits his petition for a writ of certiorari asking this Court to determine whether petitioner has been deprived of due process by the state court's decision. Petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

HARVEY R. PEARLMAN
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*A Member of the Bar*
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*On the Petition*

**APPENDIX A — ORDER OF THE SUPREME COURT OF THE STATE OF NEW JERSEY DENYING PETITION FOR CERTIFICATION**

SUPREME COURT OF NEW JERSEY
C-668 September Term 1987

28,080

CHARLES J. MOREL, JR., etc., et al.,

Plaintiffs-Respondents,

vs.

PETER W. KERO,

Defendant-Petitioner,

and

ANN KERO, etc.,

Defendant.

To the Appellate Division, Superior Court,

A petition for certification of the judgment of A-3406-86T8 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trention, this 29th day of February, 1988.

*Appendix A*

s/ Stephen Townsend
CLERK OF SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

Filed: February 29, 1988

## APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-3406-86T8

CHARLES J. MOREL, JR., Individually, and CHARLES J. MOREL JR. BUILDERS, INC., a New Jersey Corporation,

Plaintiff-Respondent,

v.

PETER W. KERO,

Defendant-Appellant,

and

ANN KERO, his wife,

Defendant.

Argued November 2, 1987 - Decided November 13, 1987

Before Judges Pressler, Bilder and Muir, Jr.

On Appeal from Superior Court, Chancery Division, Morris County

Harvey R. Pearlman and Cynthia J. Celentano argued the cause for appellant (Friedman, Kates,

*Appendix B*

Pearlman & Fitzgerald, attorneys; James Fitzgerald, Mr. Pearlman and Ms. Celentano on the brief).

Gail S. Boertzel argued the cause for respondent (Stephen S. Weinstein, attorney; Ms. Boertzel on the brief).

PER CURIAM

Defendant appeals from a Chancery Division judgment granting specific performance of a contract for the sale of an 80-acre tract of land conditioned upon plaintiff's securing a major subdivision of the tract within two years. The judgment followed a non-jury trial after which the trial judge ruled defendant had breached the contract of sale.

We affirm for the reasons set forth in Judge Stein's oral opinion of February 3, 1987. In so doing, we comment briefly on the remedy afforded by the judgment.

"Equitable remedies 'are distinguished for their flexibilty, their unlimited variety, their adaptablility to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.' " *Sears, Roebuck & Co. v. Camp*, 124 *N.J. Eq.* 403, 411-412 (E. & A. 1938).

Specific performance is an equitable remedy directed to the sound discretion and good conscience of the trial judge. *See Stehr v. Sawyer*, 40 *N.J.* 352, 357 (1963). Judge Stein recognized the

*Appendix B*

uniqueness of land which is the underlying justification for awarding specific performance. He also recognized the unconscionable conduct of defendant was designed to avoid his contract obligation. Under such circumstances, we conclude that the relief of eventual specific performance, although resting on plaintiff's gaining subdivision approval, constituted an appropriate remedy.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ Jack G. Trubenbach
Clerk of the Appellate Division

Filed: November 13, 1987

## APPENDIX C — OPINION OF THE TRIAL COURT

[Commencing at page 32]:

THE COURT: Okay.

You didn't take anything with you that was from our records, did you, by any chance?

THE WITNESS: No, I gave —

MR. WEINSTEIN: No, the impact study is there.

THE COURT: All right.

I've learned to ask that question.

THE WITNESS: Just have to weigh me on the way out, that's all.

THE COURT: All right.

MR. WEINSTEIN: I'm sorry, Judge.

THE COURT: That's okay.

What now?

MR. PEARLMAN: Well, do you want us to —

Is there any more testimony?

MR. WEINSTEIN: I have no other testimony.

THE COURT: Both sides are resting?

MR. WEINSTEIN: Yes.

MR. PEARLMAN: Yes.

THE COURT: You went me to find out what is doing with the other matter before [33] me and then get ready for summation?

MR. PEARLMAN: Sure.

It's — I'm anticipating I will be very long. It's up to you, Judge, whatever you want.

THE COURT: I'm curious to see there's another matter that's assigned, especially just for at least immediate disposition, I'm curious to see whether we can do anything in the next few minutes then.

MR. WEINSTEIN: May I just simply say this: That this case has been relatively brief, your Honor makes copious notes, I don't intend to go into a detailed summation.

THE COURT: I will have a few questions to ask both attorneys.

MR. WEINSTEIN: Fine.

THE COURT: Bear with me for one moment.

Okay. Go ahead.

MR. PEARLMAN: Your Honor, we have contended throughout this matter that there were two issues but I am not going to address myself to the financial [34] qualification issue

because that was argued at length during the motion at the end of the plaintiffs' case.

So I really only want to talk about the issue which has to do with the condition of the contract and I think the only reasonable interpretation of this contract was that it was subject to the condition that the subdivision application which was pending at the time the contract was signed be approved.

THE COURT: Now, Mr. Pearlman, the difficulty I have with that is that if I were to accept that premise, I would believe that parties entered into an agreement for the sale and purchase of real estate in the amount of almost two and a half million dollars with the seller contemplating that the condition which would finalize that contract could never be fulfilled.

Kero always knew that $400,000 would ring up no sale at the Planning Board meeting.

How could I accept that premise?

[35] MR. PEARLMAN: Because one of the reasons he testified why he went to Mr. Morel was because Mr. Morel had indicated to him that he could help him with his soil removal application that was part of his subdivision application.

One of the reasons he went to Mr. Sears was because Mr. Sears had been the Township attorney and had, in fact, according to Mr. Kero, been the author of the soil removal ordinance and while Mr. Kero knew it would be difficult, he did not recognize it would be impossible and it was the initial primary reason for him making the subdivision application.

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He was in the soil aggregate business sale of this stuff, it was an important factor to him and that's why he filed the subdivision application because he was told by Mr. Sears you cannot get soil removal without it being incident to a subdivision application. And so, yes, he understood it would be a problem, but Mr. Morel understood it would be a problem also.

[36] He understood it better than Mr. Kero because he was a guy that had done building in Montville.

THE COURT: Who?

MR. PEARLMAN: Mr. Morel.

THE COURT: Okay.

MR. PEARLMAN: Done subsequent — substantial building in Montville Township.

THE COURT: All right. I understand your argument.

What else do you wish to say?

MR. PEARLMAN: Well, I would like your Honor to take a look at the environmental impact statement that was part of the subdivision application and right on the first page, Page 1, it says in the first paragraph concomitant with the application with the application for subapproval, the applicant will seek approval to remove over 300,000 cubic yards of soil aggregate from the subject site.

In the third paragraph same page, in the creation — as mentioned above, a feature [37] of this subdivision is the necessary

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removal of soil from the site.

In the creation of the extension of the existing old lane from its present westerly point post to a new intsrsection with the Valhalla Road, significant modification to the existing topography is required.

Page 2 of the environmental impact statement in the third paragraph, establishment of building lots and roads, requires significant soil movement including removal of over 300,000 cubic yards.

Page 4 of the environmental impact statement, second paragraph from the top of the project calls for the removal of 382,000 cubic yards of natural soil from the site which will be irreplaceable as a natural resource to the area.

This was on file for Mr. Morel to see if he looked, he said he didn't look.

THE COURT: Is he obliged to look then?

MR. PEARLMAN: If his contract is [38] subject to an existing subdivision application you better believe he's obliged to look at the subdivision application or be bound by it, even if he doesn't look and this guy was a sophisticated guy. This is not some yokel, this is a guy who has built 600 homes in the past five years. He knows what an environmental impact statement is.

THE COURT: Okay.

MR. PEARLMAN: Mr. Kero was not obliged by this contract

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and I would ask the Court to point out, or counsel to point out any provision of this contract which says —

THE COURT: Excuse me.

You might want to rephrase that I know when I used to be in the business at your end, I never thought it was good diplomacy to challenge Judges to do anything. So I will let you take an end run around that one and start over.

MR. PEARLMAN: Okay.

I would ask counsel to point out to the Court any provision contained in [39] this contract which obliges Mr. Kero to substantially reduce the amount of soil that he proposed to be removed by his pending subdivision application.

There is nothing in the contract that legally requires him to take substantially less than 400,000 cubic yards.

And then we come to the revision, the revisions that Mr. Kero says he did not authorize, but there is no question that they were filed in September of 1985 a few months at most before Mr. Kero withdrew his application and these revisions then —

THE COURT: Wait a minute.

Did he withdraw his application in November of '85 or November of '85, did he tell Harry Sears to pull it?

MR. PEARLMAN: Okay.

Well, when I said, when he withdrew his application it was

either done by him or by his attorney.

THE COURT: I don't know it's ever been withdrawn.

MR. PEARLMAN: Well, I think — I [40] think there was a letter that was admitted into evidence, wasn't there, Counsel?

THE COURT: That said they were going to do it, that's all I have. I think we have a letter from Harry Sears saying I've been instructed to tell the Planning Board that we're not going any further.

MR. PEARLMAN: Okay.

Well, I don't think there's any dispute that it was withdrawn.

THE COURT: I don't know that.

MR. PEARLMAN: Well I will ask counsel if he can stipulate to it.

THE COURT: I mean I got the impression from Vitale this morning if they wanted to bring this thing up tomorrow and they can do it. That's the impression I got from Mr. Vitale, the Township engineer.

I had thought the way you thought that it was pulled out, after listening to Mr. Vitale, I'm not so sure it was pulled out at all.

I definitely got the impression from listening to Mr. Vitale that if [41] tomorrow Mr. Kero wanted to file an environmental impact statement that the matter could continue with its processing again.

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MR. PEARLMAN: There was a letter sent to the Town by Mr. Sears withdrawing the application.

THE COURT: I haven't seen that letter.

I don't believe I have.

MR. PEARLMAN: Well, Counsel, do you dispute that?

MR. WEINSTEIN: If you show me the letter, I won't dispute it.

MR. PEARLMAN: It was marked at his deposition.

MR. WEINSTEIN: Judge, may I have five seconds and I will have a second.

THE COURT: I don't really care.

MR. PEARLMAN: All right. Then —

THE COURT: I mean, I care, but I don't care, it doesn't have much to do — there's a certain inestimability to the outcome of this case based upon the facts before me.

[42] You know, you're doing a terrific job, but the facts are usually a lot closer, you can only be as good as the facts that you are giving.

MR. PEARLMAN: Well, see, Judge, I don't — I feel if your Honor was to order specific performance in this case, your Honor would, in effect, be ordering Mr. Kero to take 300,000 cubic yards less of soil than he agreed to if that is to him at $5 a cubic yard,

one million five hundred thousand dollars less.

THE COURT: But I don't believe Mr. Kero in certain parts of his testimony number one, and, number two, I don't believe that even if I believed him, that's what I would be doing.

That's one way of putting it, but it appears to me from the evidence before me that by — that just before and at the time this document was executed between Mr. Morel Builders and Kero, that Mr. Kero had let Mr. Costic know in no uncertain terms that the name of the game is let's [43] get the subdivision and go ahead and file the plans that will make the subdivision application acceptable to the Planning Board of the Township of Montville.

Now, I can't ignore that kind of testimony.

MR. PEARLMAN: That is not — there is nothing — that has nothing to do with Mr. Kero's obligations to Mr. Morel, absolutely nothing.

Mr. Kero's obligation to Mr. Morel are defined in the contract between Mr. Kero and the Morel Corporation.

What Mr. Kero said to Mr. Costic is I mean, absolutely and totally —

THE COURT: Not absolutely and totally, give me a little — anyway, I mean, I'll tell you why, because it appears to me that the contract contemplates taking steps necessary to effectuate accomplishment of the subdivision and it also contemplates modifications where necessary and if Kero told Costic, go ahead and go in with a reduced soil removal site plan, than that is what

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— then that was a modification.

[44] MR. PEARLMAN: Not part of his contract with Mr. Morel, even if we agree Mr. Kero did say those things to Mr. Costic, not part of his contract with Mr. Morel, Judge.

THE COURT: I disagree because otherwise this would have been a contemplation of a contract which never could have been fulfilled when the old world knew that the 400,000 cubic yards was not going to be an acceptable amount of soil to be moved by the municipality people don't enter into two and a half million dollar deals, that is designed to fail — at least they — the law requires me to assume that they wanted to enter into a contract which could be fulfilled.

MR. PEARLMAN: But not from 400,000 to 100,000.

THE COURT: I got it, I don't agree.

MR. PEARLMAN: All right.

Well I understand you don't agree but —

THE COURT: I could sit here like a [45] totem and listen to you and listen to Mr. Weinstein and they could like a mystery novel and then, at the end, tell you what my conclusion is, but I don't think that is fair to the party.

MR. PEARLMAN: No, I appreciate it, Judge. I appreciate your feedback but again, it was not impossible, Mr. Kero understood it was going to be hard, so did Mr. Morel and the contract speaks for itself.

You're not — you cannot take some conversation that Mr. Kero had with his own engineer.

THE COURT: Okay.

MR. PEARLMAN: As a result of which maybe revised plans were submitted seven or eight or nine months later to the Planning Board and say that in effect it was part of the contract between Mr. Kero and the Morel corporation.

In any event —

THE COURT: Listen, it couldn't possibly be that Kero cut a deal with Morel in February of '85 and as the year [46] progressed he came to see that which the rest of us saw that this County, that the property was beginning to go up in value much more than the two and a half million dollars, that the 2.4 million dollars that he originally contacted for couldn't be, could be.

MR. PEARLMAN: Well, it could very well be, but at the same time he kept on seeing the amount of soil that he could remove from the project going down to the point where Mr. Vitale said he would have recommended to the Township Committee that they not let the guy take anything off the site.

THE COURT: Well, under the rules of evidence governing the Courts of this State, statements made by agents are binding upon the principal. So Mr. Kero's testimony becomes a little suspect when this agent writes and says we're calling off the deal because I can't get my wife to sign a contract at a time when he doesn't even have this wife any more and he's not exclusive owner of the property, so —

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[47] MR. PEARLMAN: Your Honor, that is an issue I really have never completely understood.

Mr. Kero does not defend this suit by saying he cannot legally convey the property. There was some confusion in his mind as to who the owners of the property were.

He testified about trusts, he testified about a divorce action, it's not unreasonable to believe that the man was genuinely confused as to who was the owner, particularly in view of the fact that at about the same time he was receiving condemnation suits from the State of New Jersey in which they named all of his family as defendants.

THE COURT: It is unreasonable to believe when the letter was sent by Harry Sears on January 15 of 1986, isn't it?

MR. PEARLMAN: What is unreasonable to believe?

THE COURT: That he was still in some state of perplexity of who had the ownership.

[48] MR. PEARLMAN: Yes, he still thinks his family owns the property.

He testified to that and it's still unclear. He is not a lawyer, we've not taken the legal position that he doesn't own the property but he still thinks he doesn't but what does that have to do with anything in the case?

THE COURT: You will find out.

MR. PEARLMAN: Okay.

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THE COURT: I mean, I told you what I think it has to do with and you asked me what it has to do with it.

Is that a rhetorical question?

MR. PEARLMAN: I missed that point, Judge, I don't see where it has anything to do with the issues in the case.

THE COURT: Okay.

It shows maybe he just wanted more money, that he contracted for, and he was looking for an excuse that he could get off this contract including my wife, my wife has title with me.

MR. PEARLMAN: Regardless of that, Judge, the question is: Did he have a [49] legitimate reason not to go through with a transaction, not which reason he gave, did he have a legitimate reason? Was the contractual condition met? That's all.

THE COURT: Okay. I understand.

MR. PEARLMAN: Thank you, Judge.

THE COURT: Now, in the event — go ahead.

MR. WEINSTEIN: No, sir, I have nothing to add.

THE COURT: You have nothing to add? Okay.

In the event that it happens to be that I must be obliged under my findings and conclusions to take issue with your position and rule against your client, what do I do next?

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MR. PEARLMAN: Well, we've submitted a brief, your Honor, which we have argued and cited cases where your Honor cannot order specific performance of this — of a contract.

THE COURT: I can't order to a building, a — I know that, but I can [50] order people to go ahead with the subdivision application.

I can also have the plaintiff do it and charge you for it.

MR. PEARLMAN: Well it seems to me that would be unreasonable.

THE COURT: Why?

MR. PEARLMAN: It would be unreasonable because the plaintiff would have different incentives than Mr. Kero and there would be a tremendous conflict of interest because he would be concerned in getting this subdivision approval as quickly as possible so he can start building homes as quickly as possible so he can start making money on his — he wouldn't be concerned with cutting costs, getting it done in the most inexpensive way. There are a host of statutes which will — which would militate against him doing it in an economic, in the most economic manner.

THE COURT: I will appoint a special agent of the Court — wait a minute, how about that I will appoint some lawyer who [51] will process it and who will be charged with the obligation under order of the Superior Court to do it efficiently, economically and with dispatch and to make periodic reports to me as to what progress he or she is making with the Planning Board of the Township of Montville.

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Let me hear from —

MR. PEARLMAN: You are changing — you're completely changing this contract, you're altering it to what you think it should provide.

THE COURT: I am enforcing a remedy. I am trying to do it equitably, you say it's not equitable?

Here's the position which you say the matter stands: It's not right that I should order Kero to do it.

I can't. You tell me, then, Weinstein will say well, let my client do it and charge. You say well, your client has no motivation to cut costs knowing that Mr. Weinstein will be back here seeking those funds to be withheld as a credit at the time of delivery of the deed and closing [52] of title.

I say well, maybe a third person will do it efficiently because a third person is under a mandate to be economical and efficient.

Then you say, I'm changing the deal. I'm not changing the deal. I'm fashioning a remedy that's what Courts of Equity do to be fair to both sides.

MR. PEARLMAN: You're fashioning a remedy by — but in the process you're destroying tbe nature of contractual obligations.

THE COURT: That's only if you take the position that you should have won the case. You didn't.

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MR. WEINSTEIN: Judge, may I offer this as a thought for you to consider?

THE COURT: Sure.

MR. WEINSTEIN: You know, the sense that I seem to get is that counsel for Mr. Kero feels that it would be counter-productive to Mr. Morel's company to go through very fast or slowly, I might add, and get more lots.

[53] Let me just point out something on a practical basis. It's true that the contract provides that every additional lot there will be $50,000 payment up to 48 lots and that's where we come up with the 2.4 million dollars.

I offer this as a thought to you that as Mr. Morel's history and experience has dictated in the past, the houses are run somewhere in the area of 500,000 and up and, therefore, if the profit margin on these homes is 20 percent, I am not representing something you have not heard in testimony.

Let's assume 500,000 cost for a home as a minimum. The profit is going to be 100 grand. It seems to me, on a practical basis, that Mr. Morel would want to have as many lots as possible additional, expeditiously obtaining the proper lots.

THE COURT: It's simply, anyway, if I gave Mr. Morel the authority to go ahead he could only go ahead upon the last modified plan.

[54] MR. WEINSTEIN: Yes, that is true.

THE COURT: He can go ahead with anything else.

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MR. WEINSTEIN: And that is why I think —

THE COURT: What happens if he gets knocked down?

MR. WEINSTEIN: He goes back, then he goes back because the contract provides there is turned over to him without a lid, it doesn't say if it costs more than this contract avoid.

THE COURT: Let's see where it says that.

Well, does it end when the subdivision is denied?

MR. PEARLMAN: It gives him two years to get the subdivision, then the contract is over.

THE COURT: It gives Mr. Morel?

MR. PEARLMAN: No.

MR. WEINSTEIN: No it —

MR. PEARLMAN: It says if the subdivision is not obtained within two years either party can cancel the [55] contract.

THE COURT: What subdivision?

MR. PEARLMAN: That's just the point, what subdivision. The subdivision that was pending at the time the parties signed the contract?

THE COURT: How about the one that — well, suppose I

say it's the subdivision that is pending — that when the modification —

MR. PEARLMAN: Well, again, your Honor, I would argue that's changing the contract.

But the point I wanted to make was one of the reasons why the cases that we cited say you cannot give specific performance is because the Court cannot control what the Planning Board is going to do and that's why you cannot order specific performance in this situation we cited cases.

THE COURT: Oh, I'm not ordering specific performance,of the real estate. I am ordering there be specific performance of the agreement to process this before the Planning Board and in the event that [56] application is successful, I will then order specific performance of the contract of the conveyance.

I won't — that's what I am ordering.

MR. PEARLMAN: Well, there is also a large body of case law that says you cannot order specific performance of service-type acts, that is, making applications for two reasons: Number one, because you cannot control how the applications are going to be made from an engineering standpoint with all the soil removal charts or whatever else has to be produced for the Planning Board, who else knows what else they will require and you cannot control what the Planning Board is going to do.

THE COURT: Well, if the application is submitted clearly with everything that is required and then the Planning Board says, hey, that's the end of the matter —

MR. PEARLMAN: You say clearly, but what Mr. Morel

would consider to be fair, Mr. Kero might not consider fair.

[57] THE COURT: Well then I will look at what is fair.

Now, you know, you're running a risk, you go in on that application and they tell you no sale, that's the end of it, isn't it?

MR. WEINSTEIN: Well, no.

THE COURT: I don't see any obligation here that Kero has to keep coming back with modified plans every two years.

MR. WEINSTEIN: But I think the contract specifically provides the language.

THE COURT: Where?

MR. WEINSTEIN: In which Page 3 first full paragraph where it talks about "up to 48 one-family building lots."

THE COURT: Page 2?

MR. WEINSTEIN: Page 3, sir, Paragraph 2, first full paragraph, it is understood there.

See where it says, Page 3?

THE COURT: It is understood?

MR. WEINSTEIN: First Paragraph, it is understood, see where it says "For up [58] to 48 one-family building lots."

THE COURT: Oh I see.

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MR. WEINSTEIN: End of quote.

THE COURT: So you're saying there is a two-year period within which the applicant must keep going back until there's an approval of up to 48 lots?

MR. WEINSTEIN: That's exactly what I am saying.

THE COURT: Well I don't know about that.

Look, let me say this: Let's assume this fight didn't come up and Mr. Kero diligently pursued his application and it was denied.

He didn't have to go back and reply the deal is dead. Isn't it?

MR. WEINSTEIN: No, I don't think —

THE COURT: Okay.

MR. WEINSTEIN: Please hear me out. Let's assume he goes in for 48 lots and Mr. Vitale is the representative of the Board and they say look we'll approve 47 but you have to come back and file a revised plan, then the answer is yes. [59] I think he has to go back and do it.

But —

THE COURT: But what if they say, on the present application the removal of 100,000 cubic yards of soil is absolutely unsatisfactory?

MR. WEINSTEIN: Judge, they have told this man that the

subdivision — the subdivision has to be the primary feature of the application, not soil removal.

They also told him and he authorized and sent Mr. Costic back with a relisting of the plans with reference to the reduction in the removal of cubic yards.

The fact of the matter is that they can go to the Planning Board more than once if the Planning Board under my example says you can come back with 27 — rather 47, will, will not approve 48. We will not.

The answer to your question to me is yes, they must do that.

I think the other question is looking at the other side of the spectrum if the [60] Planning Board comes back and says we will authorize one lot on 31 acres, then I see I will concede to you that there need not be this relisting or refiling of the application.

But I just don't feel you have to go once and that's the end of it. Can I offer one final thing if you don't mind?

THE COURT: Yes.

MR. WEINSTEIN: If Mr. Morel on behalf of the corporation filed and shepherded it through at the expense of the defendant, the application before the Planning Board for a maximum of 48 lots, he can report back through Mr. Van Houten or through to me to the Court with a copy to counsel exactly every independent days what is happening to advise the Court to advise counsel of precisely what's happening that way it can be done expeditiously.

Mr. Morel has an interest to do it expeditiously. The cost

and expense would be done with what the years would [61] recommend at the time.

I mean, I don't understand where it would be counterproductive to the defense to do it that way if your Honor so orders it to be done.

I don't oppose the appointing of a third party attorney to shepherd it through, don't get me wrong.

But I am saying perhaps you would consider an alternative and that is let Mr. Morel take it through with the engineers, let him sit and talk to the engineers, let him get them to go through and if you want to report — have it reported through the independent attorney, you select, fine.

If you will permit Mr. Van Houten to shepherd it through and report to you, that's fine too.

THE COURT: Okay. Fine.

Judgment for the plaintiff in a manner which I will set forth shortly.

This dispute arises out of a contract of sale entered into between the parties by date of February 4, 1985.

[62] The defendant is Peter W. Kero, the seller, the remaining plaintiff is Charles J. Morel, Jr. Builders, Inc., the purchaser.

The property in question is located in the Township of Montville in this County. We are dealing in the contract with

two parcels, Parcel A is a northerly parcel, and Parcel B is a southerly which I will describe.

This litigation northerly parcel, Parcel B, is something that has really concerned itself with an option to Purchase Parcel — by the agreement the parties propose the subdivision of Parcel A into 48 proposed lots. Parcel B has a contemplated and eventual subdivision of 18 proposed lots.

The purchase price for Parcel A property first to be so decided, $2,400,000 based upon $50,000 per lot. The agreement also provides that if the final subdivision approval resulted in the existence of less than 48 lots, that property would be reduced at a rate of $50,000 per [63] lot less 48 lots.

Purchase price was to be $10,000 upon execution of the agreement which was paid. $1,150,000 on closing. That's after approval of preliminary subdivision and installation of certain improvements by the seller and concomitant with that would be the release of any mortgage of 24 lots and there would be a purchase money mortgage for the balance at $1,200,000, certain relief cost.

Now, the contract makes reference to the fact there is a subdivision application filed by the seller with the Township of Montville Planning Board and incorporated by reference a preliminary subdivision map dated December 15, 1983, "for the purpose of identifying the real property and proposed lots to be so desired."

Over the yeras, Mr. Kero had had certain applications pending before the Montville Township Planning Board to subdivide this property.

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These go back to as early as 1978, at [64] one time he had obtained sketch plot, that's what I believe is a correct phraseology, plot approval for this property allowing him to take out perhaps as much as 400,000 cubic yards, when the matter was brought back in the late '70s or beginning of 1981, before the Montville Township Planning Board.

The Planning Board made it clear to Mr. Costic who is Mr. Kero's engineer and to Mr. Kero that $400,000 removal — 400,000 cubic yards removal of soil was absolutely unacceptable and incompatible with his own plan, his own scheme of the Town of Montville because under the subdivision ordinance of the Township of Montville, everyone agrees you could only remove as much soil as was necessary to develop the property that seemed to be pretty standard language, this past decade, in such ordinances, because we have in the past 20, 30 years become mindful of the disaster that can result in such soil removal.

Kero ordered his agent, or both [65] were notified repeatedly that they didn't see any reason to remove any soil at all in order to develop this project. Notwithstanding that, there was a subdivision application submitted and an environmental impact statement submitted with that subdivision application, contemplating between 300 and $400,000 — 300 and 400,000 cubic yards of soil to be removed in order to really effectuate the subdivision of this subject property.

Again, while this matter was pending, Kero knew it would be extremely unlikely, virtually impossible to expect that the municipality or any of its Board, such as the Planning Board, would ever approve such a wholesale removal of soil.

In that setting, negotiations proceeded with Charles J. Morel,

Jr., the president and sole stockholder of Charles J. Morel, Jr. Builders, Inc. and as the negotiations proceeded, I find as a fact that as the negotiations proceeded Mr. Morel made it very clear to Mr. Sears [66] who was representing Mr. Kero that he did not want to be involved in any kind of a subdivision where the land could be ravaged by excessive soil removal and I know Mr. Morel says that's because he lived in the community, and wanted to maintain its pride and its natural beauty and that was his primary motivation for inserting into the contract of sale a provision in Paragraph 3 thereof — Paragraph 2 thereof, manifesting this purchaser's wishes to preserve the natural beauty, terrain to the extent possible and I believe he has motivation and he comes to that approach pure of heart, but the fact of the matter is he's planning to sell $500,000 homes and if he wants to sell $500,000 homes, it's best to leave a few trees standing around and not turn the landscape into craters anyway.

So there's a monetary benefit to be gained from this by preserving the natural beauty and landscape of the subject property.

[67] Now, before this contract was signed there was a meeting in the office of Mr. Vitale, Township engineer for the Township of Montville, present with Mr. Morel, Kero's engineer Costic and Vitale, and it was made very clear at that meeting that the Township Planning Board had no interest in allowing a subdivision of this property which would involve three to 400,000 — removal of three to 400,000 cubic yards of soil.

This of course is heaped upon the information which Mr. Kero and those representing him knew before that the municipalities had no such interest in wholesale removal and either at about the time of this meeting or shortly thereafter probably

just at about the time that the contract was signed by Mr. Morel, Mr. Costic and Mr. Kero discussed the matter and Mr. Costic was speaking to Mr. Morel whom he's described in the testimony — in his testimony as rather knowledgeable about the removal of soil, Mr. Costic indicated to Mr. Kero that there was no way that 400,000 [68] cubic yards of soil could ever be removed and when pressed for a ball park figure, Mr. Costic told — pressed by Kero for a ball park figure, Costic told Kero, if I have to give you a ball park figure, it's about 400 — about 200,000 cubic yards or words to that effect.

And Mr. — according to Mr. Costic's testimony on that occasion and other previous occasions, Mr. Kero made it abundantly clear to Mr. Costic that the primary concern of Mr. Kero was to get this property subdivided not to derive income from the removal of soil, and in that setting Mr. Kero, in substance, said to Mr. Costic, go ahead and do what you have to do to get this approved by making the appropriate applications before the Planning Board.

So there was an amended application filed before the Planning Board which I find the blessing of Mr. Kero based and filed by — amended map was filed redrafted by Mr. Costic and I find this was all in furtherance of what was [69] contemplated between the parties that by my making such a ruling, I'm not changing the original contract between the parties, that the party — that the contract even provides in certain provisions thereof, contemplated changes in revision and modification and applications to be made before the Planning Board of the Township of Montville and for all of those reasons, I find a contract existed between them and that the present application pending before the Planning Board is deficient in certain particulars, well, I don't know if it's pending. I didn't think it

was pending, I thought it was withdrawn until I heard the testimony of Mr. Vitale, the Township engineer, this morning indicated it's just lying there dormant and could be brought back to life again if an environmental impact statement and some other documents were filed, but we do know that no action was taken from about the time of the filing of the amended map.

When was that, anybody have that [70] date?

MR. PEARLMAN: September.

MR. WEINSTEIN: 1985.

MR. PEARLMAN: Yes.

THE COURT: September 1985 and there's a good reason for that apparently it's a reason which very frequently many people involved in the development of land, Mr. Costic said I wasn't moving too quickly for Mr. Kero because Mr. Kero was a little behind in his bills and when I got paid, I started to get business again.

Now, according to Mr. Kero, he says it was always within his contemplation to get about three to 400,000 cubic yards of soil out because that would take care of the money that would be needed to satisfy Mr. Kero's obligations to put in the improvements before the final conveyance under the contract between Kero and Morel Builders.

And he says at $5 a cubic yard, 100,000 cubic yards which he believes and what would be removed under the [71] present application if approved by the Planning Board simply isn't enough to pay — well, maybe it isn't enough but I don't have any evidence

on that one way or the other.

But I do find as a fact that his primary motivation was to see that all necessary steps were taken to approve the subdivision — to process the subdivision in a manner so it could be so approved.

Mr. Kero says in September or October or November when he realized that this application submitted by Costic was only for 100,000 cubic yards of soil to be removed from the site, he notified Harry Sears, his attorney, to kill the deal, stop all activity before the Planning Board because the Planning Board — because what Costic put into the Planning Board was without his authority, 100,000 cubic yards of soil removal.

I disagree. I don't believe it. I don't know if I could make a more specific finding than that.

[72] I don't believe it. I'm not saying that Mr. Kero is untruthful. I just don't believe that conversation took place and the reason I say I don't know if he's untruthful or not is that we have all come to learn with the passage of time we remember what we think we would like our position was at a particular time and we often remember that which appears to us to be the most favorable position at the time we now say we remember an event which took place.

But I don't expect it as true.

First of all, we're talking about Mr. Kero retaining — whom a person he regards as a responsible attorney, Harry Sears and he says I told Sears to withdraw this application before the Planning Board sometime in November.

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In the meantime, discussions are continuing between Morel and Sears well past that period because to use that vernacular, Mr. Morel is getting a little antsy, Mr. Morel is beginning to wonder why nothing is happening and meeting [73] or meetings are scheduled with Mr. Sears and Mr. Kero and Mr. Morel, and I don't know who else — maybe Mr. Costic and the meetings get canceled. That's totally inconsistent with a lawyer being told in November kill the deal, withdraw the application before the Planning Board because the first time Mr. Sears takes action to kill the deal on behalf of Mr. Kero is in January, January 15, 1986, after the cancellation by the Kero side of a meeting, and Mr. Sears writes in his letter that it turns out, I'm paraphrasing, that Mr. Kero's wife is on the deed, see J-9 in evidence and, for that reason, Mr. Kero was unable to perform the contract because his wife is a co-owner of the property and as you know, she is not a party.

He further advises me his wife is unwilling to join in the contract.

Then he says in his letter, Harry Sears says on the letter of January 15th, 1986, I have also been instructed by Mr. Kero to withdraw the pending subdivision [74] application and then doing so by letter to the secretary for Montville Township Planning Board, quite frankly I don't know if that letter was ever sent or not, I suppose we will have to find out.

So even the reason given by Mr. Kero here is not the reason given by Mr. Sears later on on the 16th of January.

By this time, of course, Mr. Kero is divorced, he received — a final judgment, of divorce by an agreement dated — the agreement — settlement agreement was dated the same date as

the judgment, January 6th, 1986, and if you read that document there's no question as to who has title. So it's inconceivable to me that Sears is writing letters giving this is the reason for cancellation.

Wife's unwillingness to sign contract or deeds unless that's what Kero told Sears to do.

I reject the contention of Mr. Kero advanced in his testimony that he thought he could get 400,000 cubic yards of soil removal from this site because Mr. Morel [75] suggested to him that he had enough pull for the subdivision to go through with 409,000 cubic yards of soil being removed or that Henry Sears had enough clout for — as the attorney representing him to satisfy that 400,000 cubic yards of soil were removed.

It is to be noted, although even if I didn't have any reason to really draw inferences, it's noted Mr. — these things involving Mr. Sears may be explanable or maybe wouldn't be if Mr. Sears were here to tell us about these matters but I propose to — I decline to draw any inferences adverse to Mr. Kero from the absence of Mr. Sears' testimony in this case.

I think the evidence more than preponderates in favor of his having breached this contract of sale.

So for that reason, I am obliged to render judgment in favor of the plaintiff.

The question is what remedy should be imposed.

[76) Oh, I want to discuss one more thing briefly.

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I would just review and incorporate by reference the statements I made regarding the financial ability of Mr. Morel's corporation which I address myself to at the time I ruled on the defendant's motion for judgment of involuntary dismissal.

I just want to say that I cannot accept the proposition that Morel was not ready, willing and able to convey just because Morel Builders wasn't ready, willing and — I'm sorry, ready, willing and able to perform. It's — to perform its end of this contractual bargain just because of the — it didn't have all of the assets or substantially all of the assets in the corporation or that the corporation wholly controlled by Mr. Morel didn't have sufficient borrowing power to fund a million two hundred thousand dollar in cash at the time of the purchase price — at the time of the closing towards the purchase [77] price.

The evidence is abundant in this case that Mr. Morel personally had ample resources required to perfom the financial obligations of his wholly owned corporation and that it would not take much time at all for whatever money was needed to be pumped into the corporation by Morel to be made available by Morel either through cash or lines of credit.

So I reject the argument inability to perfom based upon financial positions of the plaintiff, Charles J. Morel, Jr., Builders Inc.

I am going to order specific performance of that portion of the contract involving processing a subdivision application.

I agree I can't make Kero or those who work under him perform — well, I don't know if I agree, I accept the argument of defense counsel that I shouldn't be making Kero do something

he doesn't want to do by force processing these applications.

[78] I don't agree that Mr. Morel and those working under him or Morel Builders would have a motivation to run up the expenses because I believe that to be controlled and so I'm going to permit Morel Builders to process the application, I would like the parties to come back here and see if they can work out a time table.

Half-hour you want to confer with each other? And if you can't, you can't.

MR. WEINSTEIN: I would like a half hour if I could.

THE COURT: Work out a time table for processing this matter.

MR. WEINSTEIN: Yes.

THE COURT: And then if it's agreed, I will incorporate an order, if not I'll make my own ruling on the matter.

MR. WEINSTEIN: I would also like to have the opportunity, if I may, to contact Montville to find out if that — the status of the application so that at least Your Honor could have that knowledge.

[79] MR. PEARLMAN: Is this the subdivision application that either is pending now or the subject of an application that was withdrawn?

THE COURT: I don't know if it's withdrawn.

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MR. PEARLMAN: Well I say either the one — that is pending right now or the one that was pending if it was withdrawn at the time it was withdrawn.

THE COURT: I will permit Mr. Morel's company to go — to do — listen, let me say these things are always done as I understand the following manner, you run it in front of somebody and see if it will fly a little bit first. If that's the method he wants to use, fine.

I am assuming there would be an application made or continued for either 48 or 47 lots. Okay? That's the best I can say at this time.

MR. WEINSTEIN: I would just ask you not impose that strict condition on the 48 or 47 because it may come to pass that Mr. Vitale, through the Board, will [80] say, look, we'll permit 46 or we'll permit 45. I send — I don't want you to be locked in the — or the Court to be locked into that type of order where it says you have to get 47 or the deal is off because that was not the contemplation of Mr. Kero and Mr. Morel's company. That's why specifically that language in there is in there drawn by Mr. Sears in the contract, up to 48.

MR. PEARLMAN: Will there be any provision for soil removal in that application? And if so, what will it be?

THE COURT: All of those matters I suppose will take place at the next half-hour.

You want to know if there's any provision for soil removal in that? I don't know if there will be any provision for soil removal in there. I have found in this case that the contemplation of the

parties was to get on with the business of getting subdivision, I have rejected in this case the concept [81] that money derived from soil removal or operations was an integral part of the agreement so far as the agreement would rise or fall upon that.

So that's my answer. They were in there to get subdivisions, not sell dirt. That's a finding.

MR. WEINSTEIN: Judge, can we report back in a half-hour?

THE COURT: 12 o'clock.

MR. WEINSTEIN: That's fine. Thank you.

(Whereupon, Court recesses.)

* * * * *

## APPENDIX D — ORDER OF JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, MORRIS COUNTY

STEPHEN S. WEINSTEIN
A Professional Corporation
Attorney for Plaintiffs
20 Park Place
Morristown, New Jersey 07960
(201) 267-5200

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION : MORRIS COUNTY
DOCKET NO. C-2750-86 — Civil Action

CHARLES J. MOREL, JR., individually, and CHARLES J. MOREL, JR., BUILDERS, INC., a New Jersey corporation,

Plaintiffs,

-vs-

PETER W. KERO and ANN KERO, his wife,

Defendants.

### ORDER OF JUDGMENT

The within matter having been tried before the Honorable Arnold M. Stein, Judge of the Superior Court, at the Court House in Morristown, New Jersey, on February 2 and 3, 1987, in the presence of Stephen S. Weinstein, Esquire, attorney for plaintiffs, and Friedman, Kates, Pearlman and Fitzgerald, Esquires, attorneys for defendants (Harvey R. Pearlman, Esquire and Cynthia Celentano, Esquire appearing), and the Court having heard the testimony, reviewed the evidence and appropriate law, and for

good and sufficient cause;

IT IS, on this 18th day of February, 1987;

ORDERED as follows:

1. That Judgment shall be entered on behalf of plaintiff, Charles J. Morel, Jr., Builders, Inc., against defendant, Peter W. Kero, for specific performance of the contract of sale regarding property in Montville, New Jersey, which is the subject of this litigation, subject to the terms and conditions set forth in the February 5, 1985 contract.

2. That plaintiff, Charles J. Morel, Jr. Builders, Inc. has two years from February 3, 1987 to obtain all appropriate approvals as set forth in the February 5, 1985 contract.

3. That Charles J. Morel, Jr., on behalf of plaintiff Charles J. Morel, Jr. Builders, Inc., or his agents, servants or representatives, shall be authorized to make any applications which the owner, defendant Peter W. Kero, would be permitted or obliged to make in furtherance of the approval to be obtained from the Montville Township Planning Board.

4. That Charles J. Morel, Jr., on behalf of plaintiff Charles J. Morel, Jr. Builders, Inc., or his agents, servants or representatives, shall be authorized to proceed, after Planning Board approval is granted, with the subdivision improvements authorized by Montville Township.

5. That Charles J. Morel, Jr., on behalf of plaintiff Charles J. Morel, Jr. Builders, Inc., shall be required, individually or through his representatives, to provide monthly an itemized

statement of expenditures incurred in connection with the subdivision application, to Harvey R. Pearlman, Esquire of the law firm of Friedman, Kates, Pearlman and Fitzgerald, at 47 Orient Way, Rutherford, New Jersey, commencing on April 1, 1987 and on the first day of each and every month thereafter.

6. That Charles J. Morel, Jr., on behalf of plaintiff Charles J. Morel, Jr. Builders, Inc., shall be required, individually or through his representatives, to provide reports of the status of the subdivision application to Harvey R. Pearlman, Esquire on April 1, 1987, June 1, 1987, September 1, 1987, January 1, 1988 and quarterly thereafter.

7. That all costs and expenses incurred in furtherance of the Court's Order of February 3, 1987 with reference to the application for subdivision shall be ultimately deducted from the purchase price of the property pursuant to the terms and conditions of the February 5, 1985 contract.

8. That defense counsel's motion at the outset of the trial to dismiss defendant Ann Kero as a party defendant in this matter is granted.

9. That defense counsel's motion at the outset of the trial to dismiss plaintiff Charles J. Morel, Jr., individually, as a party plaintiff in this matter is granted.

10. The Court having found there was no willful breach of contract or misrepresentation by the defendant, the plaintiff's prayer for punitive damages as to Counts 4, 5 and 6 shall be denied.

s/ Arnold M. Stein
ARNOLD M. STEIN, J.S.C.

## APPENDIX E — PETITIONER'S BRIEF TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

### POINT V

### THE COURT'S ORDER OF SPECIFIC PERFORMANCE OF THE CONTRACT WAS UNLAWFUL, INAPPROPRIATE AND MANIFESTLY UNJUST.

The contract in this case cannnot *properly* be specifically enforced because it is subject to an approval which rests in the discretion of a third party, namely the Montville Township Planning Board. Since the Court cannot control the decision of the Montville Planning Board, an order for specific performance of the contract would be essentially unenforceable by the Court. For this reason our Courts have historically held that such contracts are not properly subject to the remedy of specific performance.

In the case of *Fiedler, Inc. v. Coast Finance Co., Inc.*, 129 N.J. Equity 161 (E&A 1940) the plaintiff sought specific performance of a contract seeking to be appointed as the defendant's exclusive agent to promote, develop and sell certain properties. Under the terms of the contract the defendant had a duty to set out a plan for development of the tract into lots and to lay out and dedicate streets, parks and recreational areas. The defendant was additionally required to do whatever was necessary to insure that the land when developed would be eligible for mortgages guaranteed by the Federal Housing Administration (FHA).

The defendant failed to revise his plans to meet the requirements of the FHA and the plaintiff sought a mandatory injunction requiring the defendant to file a revised map as required by the FHA, construct streets, install a water supply system and other prerequisites as were outlined by the FHA.

*Appendix E*

In denying the plaintiff's remedy of a mandatory injunction, the Court held that a decree for specific performance of the contract could not be enforced since performance by the defendant was subject in large measure to the approval of the FHA over which the Court had no control. *Fiedler, supra,* at 164. As stated by the Court:

> "The contract required the respondent to get the approval of the FHA as to maps, street construction, parks, recreation area, grade, width of street, water supply and what not. A decree compelling a specific performance of this contract and embodying the covenants imposed by the contract upon the respondent, a compliance with which manifestly rests in the will or discretion of a third party uncontrolled by the respondent, would be a vain decree, one which in truth and in fact the respondent would find it impossible to obey. Decrees which would in the final result be nugatory should not be made. 4. *Pom. Eq. Jur.* (4th Ed.) 3334 Section 1405. There was no jurisdiction over the federal agency in question. It had not been made a party; nor could this court control the discretion of that agency even if it were 'in court.' For these reasons the decree under review should be affirmed." *Fiedler, supra,* at 168-169.

Similarly, in the case of *Popular Refreshments, Inc. v. Fuller Milk Bar & Recreation Center, Inc.*, 85 N.J. Super. 528 (App. Div. 1964) the plaintiff sought specific performance of an option to purchase property when the owner of the property refused to convey said property after the local planning board had denied

his application for a subdivision. (subdivision was necessary before there could be a lawful conveyance). The Court held that the approval of a statutorily required subdivision was an implied condition precedent to the option and that specific performance could not be granted with respect to the option if the condition had not been fulfilled. Equity will not decree specific performance of a contract where compliance rests in the will or discretion of a third party uncontrolled by the defendant. *Popular Refreshments, supra,* at 540.

In the case at bar the condition precedent to the performance of the Contract was the approval of a major subdivision by the Montville Township Planning Board. The Court having no control over the Planning Board in matters within its discretion, our cases hold that the Court should not award the plaintiff specific performance of the Contract in this case.

There is another reason why the remedy of specific performance was inappropriate in the case at bar. The Contract does not describe with any specificity the work which must be performed by defendant in order to obtain approval by the Montville Township Planning Board. The Court cannot specify the work which must be done to satisfy the Planning Board. Moreover, the requirements of the Planning Board may be unreasonable, subject to being overturned on appeal. More importantly, the Court is in no position to supervise the manner in which the work is performed with respect to such things as the installation of streets, curbs, utilities and the like.

In the case of *DiCataldo v. Harold Corp.*, 15 N.J. Super. 471 (Ch. Div. 1951) the Court dismissed a complaint for specific performance holding that the agreement between the parties which called for the purchase of a lot consisting of a one-family dwelling

constructed in accordance with the plans and specifications filed and approved by the Federal Housing Administration or Veterans Administration was too indefinite for specific performance. The Court further held that "it has many times been decided that the court of chancery will not grant specific performance of an agreement to construct a building. This, because as in this case, damages at law constitute an available and adequate remedy, and further because of the practical inability of the court to compose a judgment or decree embracing with precision the specifications of the work to be done and to supervise in its performance." *DiCataldo, supra,* at 477-478.

In the case at bar, the Contract requires the defendant to seek approval for the major subdivision application which was pending at the time the contract was signed. That subdivision application was withdrawn. Which subdivision application is the plaintiff to file? What are its terms and conditions? Suppose the Planning Board requires changes. Does the plaintiff have a right to consent to them without defendant's consent? Does the defendant have a right to appeal if the Planning Board's requirements are unreasonable? Hasn't the Court below taken that right away from him? These questions point out the impropriety of the Court's judgment. By giving the plaintiff the right to pursue the subdivision application, the Court rewrote the contract and gave the plaintiff *carte blanche* to pursue any subdivision application it chooses.

Additionally, defendant is required, under the contract to improve the property by installing streets, curbs and utilities. This involves the performance of services which the Court is not equipped to supervise.

In its opinion, the Court below said:

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> "Oh, I'm not ordering specific performance of the real estate. I am ordering there be specific performance of the agreement to process this before the Planning Board and in the event that application is successful, I will then order specific performance of the contract of the conveyance.
>
> I won't — that's what I am ordering." (TII 55-21 to 25, 56-1 to 4).

It is respectfully submitted that the Court below did order specific performance of the Contract (see paragraph #1 page 2 of Order of Judgment (Da27) and in the process simply ignored the case law which sets forth the impropriety of such a remedy in this type of situation.

However, the Court's Order of Judgment was far more injurious to defendant than merely giving the plaintiff an inappropriate and unenforceable remedy, because the Court gave the *plaintiff* the right to make the application for subdivision approval and the Court gave the *plaintiff* the right to do the improvements required by the Planning Board, all at defendant's expense. These were rights and obligations given to the *defendant* by the Contract. The Court, in effect, rewrote the Contract and ordered in paragraphs No. 3, 4 & 7 of the Judgment the following:

> "3. That Charles J. Morel, Jr., on behalf of plaintiff Charles J. Morel, Jr. Builders, Inc., or his agents, servants or representatives, shall be authorized to make any applications which the owner, defendant Peter W. Kero, would be permitted or obliged to make in furtherance of the approval to be obtained from the Montville

Township Planning Board."

4. That Charles J. Morel, Jr., on behalf of plaintiff Charles J. Morel, Jr. Builders, Inc., or his agents, servants or representatives, shall be authorized to proceed, after Planning Board approval is granted, with the subdivision improvements authorized by Montville Township.

7. That all costs and expenses incurred in furtherance of the Court's Order of February 3, 1987 with reference to the application for subdivision shall be ultimately deducted from the purchase price of the property pursuant to the terms and conditions of the February 5, 1985 contract (Da27,28&29).

It is not the function of the Court to rewrite the contract between the parties. It is the intention of the *parties* to a contract, as expressed by the language contained in the contract, that controls the obligations of the parties. *Newark Publishers' Assn. v. Newark Typographical Union*, 22 N.J. 419, 427 (1956). The Courts must enforce contracts as written, and not make a better contract for either of the parties. *Kampf v. Franklin Life Ins. Co.*, 33 N.J. 36, 43 (1960).

The plaintiff has no incentive to seek the most economical means to accomplishing its goal of subdivision and improving the property. The defendant obviously does, because he is the one who is paying the expenses incurred, which can run in excess of $1,000,000. The plaintiff's primary motivation is to obtain the subdivision approval and do the improvements as quickly as possible without regard to cost (because defendant is bearing the

cost), so it can build and sell its homes and make its profits. The Court cannot, in the name of "framing a remedy" completely run "rough shod" over defendant's rights. That is exactly what the Court below did, and if this result is allowed to stand, the defendant will receive very little of the compensation called for by the Contract for his 50 plus acres of property in Montville Township. Much of the purchase price will have been consumed by expenses to develop the property without any offsetting receipts attributable to the sale of the soil removed. Now plaintiff will likely be the recipient of such proceeds, if there are any, since plaintiff will be constructing the subdivision improvements.

Under his contract defendant would have obtained $2,400,000 for the property, plus $2,000,000 for the fill, or a total of $4,400,000 less $1,000,000 for the cost of improvements, or a net of $3,400,000. Under Judge Stein's Order, defendant will be very lucky to get $1,400,000, and will probably wind up with much less because the plaintiff will determine the cost of the improvements. This is a devastating financial disaster imposed upon defendant by the Court below. It is tantamount to a confiscation of defendant's property.

## APPENDIX F — PETITIONER'S BRIEF TO THE NEW JERSEY SUPREME COURT

### POINT II

### IT IS AGAINST PUBLIC POLICY FOR A COURT TO CREATE A CONFLICT OF INTERESTS.

The trial court's order of specific performance gave plaintiff the right to make the application for subdivision approval as well as the right to do the improvements required by the Planning Board, all at *defendant's* expense. These were rights and obligations given to the *defendant* by the contract. The trial court in effect appointed plaintiff as defendant's agent and at oral argument the Appellate Division recognized this. At the very heart of any agency relationship, however, is a fiduciary responsibility running from the agent to the principal. In this case the parties have obvious conflicts in their interests and cannot conceivably maintain a valid fiduciary relationship. The trial court has created a situation akin to the classic case of the fox guarding the chicken coop.

The plaintiff has no incentive whatsoever to seek the most economical means of accomplishing its goal of obtaining subdivision approval and making the improvements required by the Municipality while the defendant obviously does because he is the one paying for it. Plaintiff is interested in speed not cost. The plaintiff can, if it so chooses, use the most expensive labor and materials available and the defendant has no recourse. Consequently, defendant will be twice damaged: he will not have the money from the sale of the soil removal to pay for the improvements and he will have the cost of said improvements, which may run well above what they would have been had defendant made them, deducted from the purchase price.

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This most blatant conflict of interests was created by the court below. It cannot be accepted as a sound and just resolution of this case.

## APPENDIX G — CONTRACT FOR SALE DATED FEBRUARY 4, 1985

AGREEMENT, made this 4th day of February, 1985, between:

PETER W. KERO
of Lake Lackawanna Road
R.D #2
Stanhope,New Jersey 07874,

(Hereinafter referred to as Seller), and:

CHARLES J. MOREL, JR. BUILDERS, INC.
140 Littleton Road
Parsippany, New Jersey 07054,

(Hereinafter referred to as Purchaser)

Seller and Purchaser hereby agree as follows:

1. PURCHASE AND SALE.

PROPERTY: Subject to the provisions and conditions of this agreement, Seller shall convey and Purchaser shall purchase and pay for, all that certain tract of land situated in the Township of Montville (the Township), Morris County, New Jersey, as hereinafter described, together with all and singular the rights and appurtenances pertaining thereto, including any right, title and interest of Seller in and to adjacent streets and alleys, rights of way, water rights, utility connections, all of which property is hereinafter collectively referred to as the Property and sometimes described as Parcel A and Parcel B. References to numbers of lots approved are for the purpose of calculating purchase price and defining the responsibility of Seller to deliver improved lots

*Appendix G*

as a condition of closing title hereunder.

The aforesaid property consists of approximately 81.61 acres and is presently the subject of a subdivision application filed by the Seller with the Township of Montville Planning Board. The preliminary suhdivision map made by Costic & Associates dated December 15, 1983 is incorporated herein by reference and made part of this agreement for the purpose of identifying the property and proposed lots to be subdivided.

The parties acknowledge that the subdivision plan is in two sections, one of which will be designated as Parcel A for purposes of this agreement consisting of 48 proposed lots and comprising the upper or westerly portion of Seller's whole tract. Parcel B comprises the lower or easterly section of the whole tract and consists of 18 proposed lots.

Seller's entire tract is known as Lots 1, 85, 90, 91 and 99, Block 39 on the Tax Map of the Township of Montville.

2. SUBDIVISION OF PROPERTY.

It is agreed that subdivision of the property shall be diligently pursued by and at the expense of the Seller, it being agreed, however, that Purchaser shall be satisfied that the plan submitted conforms to its wishes with regard to preservation of natural beauty and terrain to the extent possible. To that end it is agreed that any substantial changes made during the subdivision process shall be submitted to Purchaser for review and where appropriate it shall have the right to participate in Planning Board meetings or discussions with municipal officials relative to the plan.*

---

*At least quarterly Seller shall advise the Purchaser, in writing, as to the status of the Subdivision.

*Appendix G*

It is understood and agreed that this agreement is conditioned upon and subject to approval by the Planning Board of Montville Township for up to 48 one-family building lots in the section of the property herein described as Parcel A and now shown on the preliminary subdivision map as containing 48 lots.

This agreement contemplates a conditional contract between the parties as to Parcel A, with an option to the Purchaser for the section known as Parcel B (18 lots as now shown on said preliminary map).

3. THE PURCHASE PRICE.

For Parcel A the Purchaser agrees to pay, or cause to be paid to the Seller, the sum of $2,400,000.00 based upon $50,000 per lot as the purchase price, to be paid in the manner specified in Paragraph 4 hereof.

4. PAYMENT OF THE PURCHASE PRICE.

4.1 Upon execution of this agreement the Purchaser shall pay the sum of $10,000 representing the deposit, same to be paid over to the attorney for the Seller, in escrow, to be held by said attorney until closing. Upon receipt of preliminary sudivision approval, Purchaser shall pay an additional $40,000 by way of deposit to said attorney and all deposit moneys shall be held in an interest bearing account with interest accruing to the benefit of Purchaser. In addition to the deposit the balance of the purchase money shall be paid in the following manner:

(a) Cash on closing and release of 24 lots: $1,150,000
(b) By purchase money Note and Mortgage on the remaining lots for two (2) years, with interest at 10% per

annum, payable quarterly and providing for releases at $50,000 per lot plus accrued interest to date on the amount paid for releases: $1,200,000

If less than 48 lots are approved the price and mortgage amount shall be adjusted accordingly.

4.2 On the basis of 48 lots the total purchase price shall be $2,400,000 for Parcel A, it being understood that Seller shall be responsible for installation of all required municipal improvements pursuant to Planning Board approvals, notwithstanding they have to be completed after closing of title.

5. CONTINGENCIES AND REPRESENTATIONS.

Seller represents that he is the owner of the premises described herein. Purchaser represents that he is financially and otherwise qualified to enter into this agreement.

6. OBLIGATIONS OF THE SELLER AND PURCHASER PRIOR TO CLOSING.

Seller shall at his expense proceed with the subdivision application and such other applications as may be necessary to obtain preliminary and final subdivision approvals and the right to obtain building permits for the construction of one-family dwellings on the property. Further, Seller shall install all municipal improvements and provide such bonds or other guarantees as may be necessary to deliver fully improved lots to the Purchaser. Seller shall be responsible for provision and installation of gas, electric, telephone lines and water mains and Purchaser understands and agrees that the cost and installation of septic systems, if required, will be its sole responsibility. Purchaser shall also be responsible

for obtaining all building and other permits necessary for the construction of homes.

7. CLOSING OF TITLE.

7.1 Purchaser's obligation to close title to the property is limited to the westerly or upper section consisting of 48 lots. The balance of the property will be the subject of an option as hereinafter set forth. The parties recognize that it may be necessary to withhold or delay processing the subdivision approval as to Parcel B in order to meet Planning Board priorities and Seller reserves the right to either delay the application or withdraw it as to said Parcel B, in which event the Purchaser's option shall be null and void. Closing shall be held not less than 60 days after all approvals have been obtained so as to qualify the first 24 lots for building permits. Closing shall take place at the office of Sears, Pendleton, Sweeney & Claps, Esqs., 57 Old Bloomfield Avenue, Mountain Lakes, New Jersey, or such other place as may be agreed upon.

7.2 At the closing Seller shall deliver a Bargain and Sale Deed (Covenant as to Grantor's Acts) and an Affidavit of Title in standard form.

7.3 In the event the approvals provided for herein have not been obtained within two years from the date hereof, either party shall have the option to cancel this agreement on six months notice, in writing, in which event neither shall have any further obligation to the other; except, however, the deposit monies plus accrued interest shall be refunded to the Purchaser.

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8. REAL ESTATE COMMISSION.

Both parties recognize the Steinberg Agency as the only broker or person entitled to a commission or finder's fee hereunder. The obligation to pay commissions shall be Seller's, under a separate agreement between him and the agency.

9. MARKETABLILITY OF TITLE.

Seller represents to the Purchaser that he is unaware of any restrictions, easements, or agreements which in any way would affect or prohibit the construction of one-family housing units on the premises to be conveyed. In the event any such restriction, covenant, easement, or other encumbrance should interfere with the utilization of the premises for the intended purpose, Purchaser shall have the right to declare this agreement null and void, and shall be entitled to the return of all deposit monies.

10. TITLE TO SUBJECT PROPERTY.

Title to the entire tract and/or any part thereof shall be clear and marketable and shall be such only if insurable, without substantial exception, at regular rates by any title insurance company, licensed to do business in the State of New Jersey, of Purchaser's choice. Further, it shall be a condition precedent to Purchaser's obligation to perform under this agreement that Purchaser obtain clear and marketable title to all building lots.

11. ASSESSMENTS FOR MUNICIPAL IMPROVEMENTS.

If at the time of delivery of the deed, the property or any part thereof being conveyed shall be or shall have been affected

by an assessment or assessments which are or may become payable in annual installments, then for the purposes of this agreement, all of the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the property affected thereby and shall be paid and discharged by the Seller at the time of closing and delivery of the deed.

12. OPTION.

With the same rights of review during subdivision as provided in Paragraph 2. hereof, Purchaser shall have an option to purchase the lots ultimately subdivided as part of Parcel B hereinabove described at a purchase price of $50,000 per improved lot. This option shall be exercised by Purchaser by submission to Seller of a written offer to close title with a minimum downpayment of one-third of the total purchase price, the balance to be paid by purchase money note and mortgage on the same terms provided herein for purchase of Parcel A. Such written offer shall be submitted to Seller not more than three months following the closing of title to said Parcel A or final approval of Parcel B by the Planning Board, whichever is later, and shall be accompanied by a check in the amount of 10% of the purchase price by way of deposit to be held under the same terms as for Parcel A. If this option is exercised as hereinabove set forth, closing of title shall be held not more than one year from the date the written offer is received by Seller or on such date as may be agreed upon between the parties.

13. ADJUSTMENTS.

Taxes and any other adjustable costs shall be apportioned

and allowed as of the date of closing title hereunder.

14. PROHIBITION AGAINST FILING OR RECORDING THIS AGREEMENT WITHOUT CONSENT OF EITHER PARTY; RIGHT TO FILE OR RECORD MEMORANDUM OF THIS AGREEMENT.

None of the parties hereto will file or record this agreement in any public office without the prior knowledge and written approval of the other party hereto.

15. NOTICES.

All notices required or permitted to be delivered hereunder shall be deemed delivered, whether received or not, when sent by United States mail, postage prepaid, certified mail, return receipt requested, addressed to Seller or Purchaser, as the case may be, at the address set forth above, and to the Seller's or Purchaser's designated attorneys at the designated office address. For purposes of this agreement,the Purchaser designates Henry Rowe Van Houten, Esq., 3 Dorian Road, Boonton, N.J. 07005, as the Purchaser's representative, likewise designated to receive notices. The Seller hereby designates Harry L. Sears, Esq. of Sears, Pendleton, Sweeney & Claps, 57 Old Bloomfield Avenue, Mountain Lakes, New Jersey 07046.

16. GOVERNING LAW.

This agreement shall be construed under and in accordance with the laws of the State of New Jersey.

*Appendix G*

17. ASSIGNMENT.

Purchaser shall have the right to assign this agreement to a corporation, partnership or other entity of which Charles J. (Jack) Morel, Jr. owns at least a 50% interest.

18. PARTIES BOUND.

This agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals, or caused these presents to be signed by the proper corporate officers and the corporate seal to be hereto affixed, the day and year first above written.

SIGNED, SEALED AND
DELIVERED IN THE
PRESENCE OF:

s/ Steve Hay

s/Peter W. Kero L.S.
Peter W. Kero

ATTEST:

CHARLES J. MOREL, JR.
BUILDERS, INC.

s/ Patricia A. Morel
Secretary

s/ By Charles J. Morel, Jr.
President

No. 87-1992

Supreme Court, U.S.
FILED
JUN 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1987

PETER KERO,

*Petitioner,*

*vs.*

CHARLES MOREL, JR., Individually and CHARLES J. MOREL, JR. BUILDERS, INC., a New Jersey Corporation,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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## STATEMENT OF THE CASE

The respondent will accept those facts asserted by the petitioner solely for the purpose of this presentation to the United States Supreme Court.

## SUMMARY OF ARGUMENT

The decision below was rendered in absolute conformity with the power vested in the New Jersey Superior Court, Chancery Division to fashion an equitable remedy in the instant case. There is no basis for the claim that the remedy in effect constitutes a confiscatory taking without compensation which would abridge petitioner's due process rights. Thus, petitioner may not properly invoke the jurisdiction of this Court pursuant to 28 U.S.C. Section 1257(3).

## ARGUMENT

The legal principles which govern the decision below have been well established by the court for many years. The court did not, in effect, re-write the contract as petitioner asserts. Rather, it ordered that specific performance be awarded to the respondent because petitioner failed to process the subdivision application as agreed to and specified in the terms of the contract. Petitioner's claim that the remedy fashioned was beyond the limits of the court's power is unfounded. The court below was acting well within the scope of its authority. Equitable remedies "...are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so

as to fit the changing circumstances of every case and the complex relations of all the parties." *Sears Roebuck & Co. v. Camp,* 124 N.J. Eq. 403, 411-412 (E. & A. 1938), 1 A.2d 425.

The opinion rendered by the trial court drew an important distinction between specific performance of the agreement to process the application and specific performance of the contract of conveyance. It is undisputed that a decree of specific performance of a contract may be untenable where that contract is subject to approval which rests in the discretion of a third party. However, there is no impropriety in the court's having ordered specific performance of the agreement to process the subdivision application where the evidence clearly shows petitioner did not demonstrate the requisite due diligence to pursue the application itself.

Petitioner further contends that the decision rendered by the trial court, whereby respondent, in conjunction with the Montville Township Planning Board, was authorized to design the subdivision, make the application for subdivision approval and construct the necessary municipal improvements, all at petitioner's expense, is tantamount to a confiscation of petitioner's property. He alleges that vesting such authority in respondent signifies a blatant conflict of interest that would certainly deprive petitioner of the proceeds due him as contemplated by the terms of the contract. Clearly, respondent is even more motivated than petitioner to obtain approval of the subdivision application as expeditiously as possible, thus enabling the conveyance to go forward. Petitioner and respondent alike have such an interest. Insofar as the petitioner will be compensated for the sale of land only with the approval of the Planning Board, the respondent's interest in expediting this approval lies in the fact that he must

first build and then sell the proposed units before he will realize a profit. Indeed, to safeguard against concerns about respondent's using inappropriate or excessive measures to petitioner's detriment, the lower court offered to appoint a third party to ensure that respondent proceeded with economy, efficiency and dispatch. (Pa 19 to 20). Finally, the court ordered that respondent issue regular status reports to petitioner. (Pa 41 to 42). Thus, petitioner should be precluded from advancing an expropriation claim merely by virtue of his anticipating some as yet unquantified injury to himself.

Petitioner asserts that he raised the issue of a violation of due process in the trial court when, in response to the judge's indication that he could order respondent to proceed with the subdivision application and charge him for it, petitioner responded "that would be unreasonable." (Pa 19).

Petitioner then contends that his reference in the Appellate brief that such an order was "...tantamount to a confiscation of defendant's property" amounted to a due process argument. (Pa 49). Finally, petitioner claims to have raised the issue on a third occasion in his petition for certification to the New Jersey Supreme Court. There he theorized that the lower court's order in effect made respondent the petitioner's agent and, in the face of their contrary interests, they could not possibly maintain a valid fiduciary relationship. (Pa 50).

To comply with the court's jurisdictional requirements petitioner must have "...specially set up or claimed under the Constitution...of...the United States..." the right he now seeks to have the court enforce. 28 U.S.C. Section 1257(3). The requirement necessitates that petitioner assert a clear and specific

violation of this federally protected right in order to prevail. This Court specifically addressed the stringency of this requirement in *Webb v. Webb*, 451 U.S. 493 (1981). There, the court dismissed a petition for certification because "...although petitioner did use the phrase 'full faith and credit' at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on the full faith and credit clause of the Federal Constitution." *Id.* at 1891. The record in the instant case substantiates respondent's contention that the petitioner has failed to raise or preserve a valid claim either expressly or by clear implication sufficient to comport with the statutory requirement. Accordingly, respondent respectfully submits that in the absence of any specific reference to the Fifth and Fourteenth Amendments below the petitioner must be precluded from advancing a due process argument before this Court.

## PETITIONER'S AUTHORITIES DISTINGUISHED

Petitioner relies heavily on *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Hawaii, 1978), and *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673 (1930) to support his posture that the remedy designed by the lower court constituted an unjust taking without compensation. It is unquestionable that the court would be acting unlawfully were it to deprive petitioner of his property rights without due process. However, closer inspection will reveal that petitioner is unable to substantiate such a claim.

In *Sotomura*, the trial court re-defined the seaward boundary of plaintiff's land to determine the extent of the erosion and the size of plaintiff's land which ultimately reduced the compensation paid to plaintiff. The District Court properly held that such a

decision did in fact constitute a taking without just compensation. That decision however must be distinguished from petitioner's claim because there is no credible evidence offered by petitioner to show that the alleged redefinition and redistribution of petitioner's rights and obligations under the contract would necessarily work to his fiscal detriment and thus constitute a confiscatory taking. Furthermore, to the extent the remedy provided by the court below did work to petitioner's detriment, such would be entirely owing to his continuing failure to comply with his contractual obligations.

Though petitioner also relied heavily on the court's opinion in *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673 (1930), he misinterpreted the reasoning in that opinion in applying it to the facts of the instant case. The court in *Brinkerhoff-Faris* stated that "...whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 682.

It is undisputed that a state may not deprive any person of the existing remedies for the enforcement of a right. However, the court should note that petitioner had, for almost two years, the very real opportunity to protect the right he now claims has been usurped. It was solely in response to petitioner's failure to fulfill his contractual obligations that respondent was forced to seek such a remedy as the lower courts have awarded him.

## CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain its burden under 28 U.S.C. Section 1257(3) to demonstrate that a writ of certiorari should issue. No constitutional question was specifically raised or clearly implied in the court below. The Appellate Division of the New Jersey Superior Court was correct in affirming the lower court's grant of eventual specific performance and in judging such relief to be an appropriate remedy. The New Jersey Supreme Court was correct in denying the petition for certification.

For the reasons set forth above, the respondent herein submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

STEPHEN S. WEINSTEIN
*Attorney for Petitioner*

## APPENDIX A — EXCERPTS OF APPELLATE DIVISION BRIEF

### POINT V

### THE SPECIFIC PERFORMANCE ORDERED BY THE COURT WAS PERFECTLY LEGAL AND APPROPRIATE

Throughout this point defendant mistakenly asserts that the Order entered by the trial court is improper because it attempts to control the decision of the Montville Township Planning Board. A careful reading of the Order (Da 26 to 30) reveals that the Order does not do so, as will be developed herein. If the Order does not compel the Planning Board to act, then defendant's argument must fail.

Defendant relies heavily on the case of *Popular Refreshments, Inc. v. Fuller's Milk Bar, etc.*, 85 *N.J. Super.* 528 (App. Div. 1964), certif. den. 44 *N.J.* 409 (1965) for the proposition that specific performance cannot be decreed where compliance rests in the will or discretion of a third party not controlled by the defendant. (Db 29-20 to 30-10). At first blush, the two cases appear similar in that both involved contracts to convey real estate which were conditioned (impliedly in *Popular Refreshments*) upon subdivision approval by a local planning board. In both cases, it appeared that the defendant-seller was reluctant to sell and "...found welcome escape...in the providential refusal of the planning board to approve the subdivision." *Id.* at 536. The actual denial of approval in *Popular Refreshments, supra.*, at 533, is an important distinguishing factor.

In the present case, defendant's application was withdrawn as opposed to being denied. Nor was an approval of the denial

taken in *Popular Refreshments, supra.*, at 534, and the court expressed strong doubts an appeal would have succeeded in light of a zoning ordinance amendment. *Id.* at 539. Thus, the available remedy to the court in *Popular Refreshments* necessarily would have mandated an attempt to order a third party, i.e. the planning board, to do something, i.e. approve the subdivision in order to be able to compel specific performance of the conveyance by defendant.

In contrast, in the case at bar, the court has not ordered defendant to convey the property. Rather, defendant has been ordered to specifically perform the obligation he voluntarily undertook in Paragraph 2 of the contract, (Da 45), namely to diligently pursue obtaining the subdivision. Defendant repeatedly fails to recognize the distinction between compelling specific performance of the conveyance as opposed to specific performance of the obligation to diligently pursue approval of the subdivision. If and when the planning board denies defendant's application, then the case would be at the same juncture as *Popular Refreshments* in that the condition precedent was unfulfilled, thus negating an obligation to convey.

Finally, the court in *Popular Refreshments* expressed strong reservations about the likelihood of approval, assuming the defendant had submitted revised plans. There is no reason for such pessimism in the instant case. The revised plans submitted by Mr. Costic, defendant's engineer, were prepared in response to a meeting with Mr. Vitale, the township engineer. Mr. Costic understood the townships ordinance concerning soil removal and prepared the revised plans accordingly, reducing the proposed

amount of soil removal from 382,000 cubic yards to 100,000 cubic yards. There was no testimony presented which indicated a likelihood that the application would be rejected.

Defendant's reliance upon the case of *DiCataldo v. Harold Corp.*, 15 *N.J. Super.* 471 (Ch. Div. 1951), is also misplaced for two reasons. First, as in *Popular Refreshments, supra,* the specific performance requested would have required an attempt by the court to order the F.H.A. or the V.A. to approval something, in that case, house plans. However, as pointed out, *supra.*, Judge Stein's order in no way even suggests an attempt to order the Montville Township Planning Board to take a certain course of action. Second, the contract plaintiff sought specific performance of in *DiCataldo, supra.*, at 477, involved construction of a building. Traditionally courts will not become involved in enforcing a construction contract due to the adequacy of the remedy of money damages and the practical inability of the court to supervise performance. *Id.* at 478. The present case does not involve construction of any buildings. Defendant claims it would involve judicial supervision of installation of the improvements. (Db 31-24). This is not so because if the subdivision is granted, Montville Township will be overseeing that the improvements are installed as required by the terms of the subdivision approval.

In the third case cited by defendant, *Fiedler, Inc. v. Coast Finance Co., Inc.*, 129 *N.J. Eq.* 161 (E & A 1940) specific performance is again rejected because the court's decree would have ordered the F.H.A. to act and the court noted its lack of jurisdiction and authority to do so. *Id.* at 169. Plaintiff reiterates that Judge Stein carefully framed the relief so that it did not

attempt to order the Montville Township Planning Board to act. Hence, *Fiedler, Inc., supra.,* is not dispositive.

Defendant then argues that because the original contract does not specifically describe the work he was to perform for subdivision approval, specific performance was an inappropriate remedy. (Db 30-11). Paragraph 7 of the contract (Da 48) essentially states that the seller will do whatever work is required by the township in order to obtain approval pertaining to municipal improvements and the installation of gas, electric, telephone and water lines. For defendant to now request more specificity or a monetary limit on his obligation would be tantamount to asking the court to rewrite the contract in a manner more favorable to him. As defendant himself states, the court should not make a better contract for either party, citing *Kampf v. Franklin Life Ins. Co.,* 33 *N.J.* 36, 43 (1960). (Db 33-10)

Similarly the defendant points out other potential problems that could arise with respect to modification of the subdivision application. (Db 31-10). However, assuming, *arguendo,* that these problems potentially exist, their potential was inherent in the original contract itself which defendant knowingly and voluntarily signed. It would have been inappropriate for the court to have put limitations on defendant's contractual obligation to diligently pursue the subdivision which contemplated changes in the application. (Da 45). In essence, the court would then have been entering the forbidden sphere of rewriting the contract.

Defendant claims that the trial court improperly rewrote the contract when it substituted plaintiff for defendant as the party

to pursue the subdivision application and do the required improvements. (Db 32-12 to 33-11). It became clear to the court that defendant was looking for a way to avoid performance of the contract as evidenced by his official reason for cancellation, namely that his wife was on the deed, when he was no longer even married to her at the time the letter was written. (TII 46-19 to 24; 48-19 to 23). It would been futile to order defendant to pursue the application. In all likelihood the plaintiff would have been returning to court in short order complaining that defendant was not complying. Or the scenario of *Popular Refreshments, supra.*, at 533 could occur where the defendant did not revise the submitted plans as requested and simply accepted the planning board's denial. That would not fly in the present case since there is an obligation to diliqently pursue approval.

Judge Stein did not alter or modify what was to be done. Rather he astutely foresaw certain likely problems with the defendant and took precautionary steps by ordering Mr. Morel to act. Plaintiff, as purchaser, is certainly an interested party and has a vested interest in obtaining subdivision approval. Paragraph 2 of the contract specifically authorizes plaintiff to review changes in the plans and participate in Planning Board meetings and discussions with municipal officials. (Da 46-1 to 4). Thus he is not an improper or inappropriate party to seek the subdivision. In *Gulf Oil Corp. v. Montanaro,* 94 *N.J. Super.* 348, 352 (Ch. Div. 1967), the plaintiff purchaser made the application for subdivision approval and the court made no suggestion that there was anything improper and seemed to imply that plaintiff could have been criticized if it did nothing. See also *Popular Refreshments, supra.*, at 539 where the court discusses that either

plaintiff or defendant could have pursued remedies pertaining to the planning board's decision.

As far as defendant's concern that with plaintiff acting, the costs will be exorbitant, he is not without remedy.* Judge Stein specifically stated that if such a dispute arises over the application, he will determine what is fair and appropriate. (TII 56-23 to 57-2). This is consistent with the discretionary powers of the Chancery Court and the equitable nature of the remedy. *Weisbrod v. Lutz,* 190 *N.J. Super.* 181, 186 (App. Div. 1983). In *Weisbrod, supra.,* at 185, interest rates had risen dramatically from the time the contract was originally entered. The trial court decided not to enforce a decree of specific performance under the circumstances and the Appellate Division affirmed the decision. Thus defendant is not permanently locked in, for example, if the planning board approved no soil removal, only ten lots and the cost of improvements had increased to $2,000,000 thus resulting in a $1,500,000 loss.

Just as the figures set forth by plaintiff above are purely hypothetical, the court should realize that the defendant's mathematical analysis is also not based on reality. Defendant sets forth calculations which are designed to lead this court to believe that defendant has lost over $2,000,000 as a result of Judge Stein's decision. (Db 34-4 to 12). The argument is specious. Judge Stein found, based on ample testimony, that defendant, when he entered

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*To date there is no factual support for any claim by defendant that plaintiff is not acting in a fiscally prudent manner. The expenditures up to July 31, 1987 total $11,057.24 which include calculations for time spent by Mr. Morel and other personnel of the corporation. (Pa 1 to 15).

the contract, knew he would not be permitted to remove 382,000 cubic yards of soil. Thus defendant never expected to obtain $2,000,000 for the fill.* Under the revised plans submitted with defendant's authority, defendant would still receive approximately $500,000 for the fill, resulting in a profit of $1,900,000.

The order of the trial court was carefully tailored to comply with the terms of the contract as written and to merely accomplish what had not been done as a result of defendant's breach. Both parties are still in position to receive what they originally bargained for under the terms of the order. Not only was the order legally proper, it should serve as a model of how well a chancery court can function using its equitable powers.

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*The testimony was that the price of fill ranged from $4 to $5 per cubic yard. Multiplying 382,000 cubic yards by the price of $4 to $5 would have resulted in a maximum realization of $1,528,000 to $1,910,000 breach.